Supreme Court, U.S.
FILED

94 875 NOV 1 4 1994

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Barbara Jean O'Neil
nka Barbara Jean Kerpsack,

Petitioner,

versus

Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Ninth Circuit Rule 39-1.6, Request for Attorneys Fees, which requires any party who intends to request attorneys fees on appeal to include in its opening brief a short statement of the authority pursuant to which the request will be made, defeat the Congressional intent of 26 U.S.C. §7430, which gives the requesting party thirty days from the final judgment in the action to submit to the court an application for fees and other expenses.

2. Does Ninth Circuit Rule 39-1.6 as described above, when applied to this case wherein Petitioner was Appellee before The United States Court of Appeals for the Ninth Circuit and filed her brief (omitting a short statement of the authority pursuant to which the request for attorneys fees will be made) after all time limits for Internal Revenue Service to appeal and file briefs had passed, cause an unjust and inequitable result.

3. Does Ninth Circuit Rule 39-1.6 as described above, when applied to this case wherein Petitioner was being represented by pro bono attorney who, but for this case, left the practice of law in 1989, continued to represent Petitioner at great personal expense to herself

even after she moved 3,000 miles away to pursue an MBA at The Wharton School, and was unaware of 28 U.S.C. §7430 until The United States Court of Appeals for the Ninth Circuit filed its Memorandum and served her with information about 26 U.S.C. §2412, cause an unjust and inequitable result.

4. Does Ninth Circuit Rule 39-1.7, Opposition to Request For Attorneys Fee, which requires any party from whom attorneys fees are requested to file any objection within 14 days after service of the request, allow the Internal Revenue Service to file such an objection approximately 27 days after such service.

PARTIES TO THE PROCEEDING

The parties to the proceeding in The United States Court of Appeals for the Ninth Circuit are those in the caption as well as Raymond Carey, Bankruptcy Trustee, who was Defendant in the original Complaint in Bankruptcy, Appellee in the United States District Court appeal, and Appellant in the appeal to The United States Court of Appeals for the Ninth Circuit; however, Raymond Carey is not a Respondent to this Petition For A Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Barbara Jean O'Neil
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Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the Order of The United States Court of Appeals for the Ninth Circuit entered in this action on August 15, 1994.

OPINIONS BELOW

There are no reported opinions in this case. The Order Disallowing Claim and Order On Motions For Summary Judgment of the United States Bankruptcy Court for the Northern District of California are unreported (see Appendix, pages 3 to 8). The Related Case Order of the United States District Court for the Northern District of California is unreported (see Appendix, pages 9 to 10). The Memorandum And Order of the United States District Court for the Northern District is unreported (see Appendix, pages 11 to 19). The Memorandum of The United States Court of Appeals for the Ninth Circuit is unreported (see Appendix, pages 20 to 29). The Orders of The United States Court of Appeals for the Ninth Circuit are unreported (see Appendix, pages 1 to 2). (These Orders are at issue in this Petition For Writ Of Certiorari.)

THIS COURT'S BASIS FOR JURISDICTION

The Order (on Appellee's request for attorney's fees) of The United States Court of Appeals for the Ninth Circuit was entered on August 15, 1994. The Order (on Appellee's Motion for Reconsideration and Clarification of Order Denying Request for Attorney's Fee) was entered on September 23, 1994.

This Court has jurisdiction to review the Orders of The United States Court of Appeals for the Ninth Circuit pursuant to 26 U.S.C. §7430(f)(1) and 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND CIRCUIT RULES INVOLVED

26 U.S.C. §7430 Awarding of costs and certain fees is set forth in the Appendix, pages 25 to 33.

28 U.S.C. §2412(d)(1)(A) and (B) and (d)(2)(B) are set forth in the Appendix, pages 34 to 36.

5 U.S.C. §504(a)(1) and (a)(2) are set forth in the Appendix, pages 37 to 38.

28 U.S.C. §1254(1) is set forth in the Appendix, page 39.

Ninth Circuit Rule 39-1.6 Request for Attorneys Fees is set forth in the Appendix, page 40.

Ninth Circuit Rule 39-1.7 Opposition to Request for Attorneys Fees is set for in the Appendix, page 40.

STATEMENT OF THE CASE

The Internal Revenue Service:

- levied the Debtors' bank account for a debt they did not owe;
- forced the Debtor to sue it for refund;
- filed a motion in Bankruptcy Court and did not bother to show up to argue that motion;
- filed a reply brief in the appeal before the United States District Court;
- joined in the Trustee's motion for stay of enforcement of the United States District Court's order pending appeal before The United States Court of Appeals for the Ninth Circuit; and
- throughout the entire case, rather than addressing the issue of whether Debtors actually owed the debt they were forced to pay, asserted only the following unjustified positions:
  - that the Internal Revenue Service had sovereign immunity;
  - that the court had no authority to determine tax liability; and

- that material issues of fact remained in dispute (though this was not true. and the Internal Revenue Service made *no* efforts to satisfy any factual questions it was allegedly disputing).

On May 6, 1994, The United States Court of Appeals for the Ninth Circuit affirmed the United States District Court For The Northern District's Memorandum And Order entered April 9, 1992. The Internal Revenue Service, Respondent herein, was ordered to return to Barbara Jean O'Neil nka Kerpsack, Petitioner herein, and her ex-husband, Barry P. O'Neil, the money that was wrongfully levied from them.

On June 3, 1994, Petitioner filed an Application For Attorneys Fees, pursuant to Ninth Circuit Rule 39-1.6 and 26 U.S.C. §7430.

On June 29, 1994, Respondent mailed its Motion For Leave To File Opposition To Application For Attorney's Fees Out Of Time and Opposition To The Debtor's Application For Attorney's Fees And Costs.

On July 12, 1994, Petitioner filed Debtor's Points and Authorities In Opposition To Internal Revenue Service's Motion For

Leave To File Opposition To Application For Attorney's Fees Out Of Time.

On August 15, 1994, The United States Court of Appeals for the Ninth Circuit denied the Petitioner's request for attorney's fees.

On August 24, 1994, Petitioner filed Debtor's Motion For Reconsideration And Clarification Of Order Denying Request For Attorney's Fees.

On September 23, 1994, The United States Court of Appeals for the Ninth Circuit, pursuant to Ninth Circuit Rule 39-1.6, denied the Petitioner's Motion For Reconsideration And Clarification Of Order Denying Request For Attorney's Fees.

Petitioner submits this Petition For Writ Of Certiorari on the issue of attorney's fees and costs.

LOWER COURTS' BASIS FOR FEDERAL JURISDICTION

The United States Bankruptcy Court's jurisdiction is pursuant to 28 U.S.C. §§157(a) and (b) and 1334(a).

The United States District Court's jurisdiction is pursuant to 28 U.S.C. §158(a).

The United States Court of Appeals' jurisdiction is pursuant to 28 U.S.C. §158(d).

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES AN IMPORTANT QUESTION OF LAW AND EQUITY REGARDING THE EXTENT TO WHICH RULES OF CIRCUIT COURTS CAN UNDERMINE EXPLICIT CONGRESSIONAL STATUTORY INTENT.

Congressional intent is explicit, consistent, and totally understandable. Congress, in three separate statutes (26 U.S.C. §7430(a)(2) and (c)(4)(A)(i), 28 U.S.C. §2412(d)(1)(A), and 5 U.S.C. §504(a)(1)), directed that parties that prevail against the United States in an adversary adjudication (in any tax matter, in any civil action (other than cases sounding in tort), and in an agency adjudication) can recover attorney's fees and costs when the position of the United States was not substantially justified. The first statute is worded as permissible (may) and the second and third statutes are worded as mandatory (shall). All three statutes give the requesting party thirty days after the final judgment or disposition to submit the application for attorney's fees and costs (26 U.S.C. §7430(c)(4)(A)(iii), 28 U.S.C. §2412(d)(1)(B), and 5 U.S.C. §504(a)(2)). Congress obviously believed that parties who were

forced to engage in lengthy litigation against the United States' substantially unjustified position should not be required to bear the burden of paying its own attorney's fees and costs. Given the practically omnipotent power of the United States and its propensity to misuse that power, these statutes are easily understandable in their attempt to affect justice and equity.

While 26 U.S.C. §7430(c)(4)(A)(iii) allows differing procedures to be established by rules of court, there is no indication that Ninth Circuit Rule 39-1.6, which requires any party who intends to request attorneys fees on appeal to include in its opening brief a short statement of the authority to which the request will be made, is not merely a "differing procedure." It fundamentally alters the statutory rights that Congress granted. Further, Ninth Circuit Rule 39-1.6 apparently covers all requests for attorney's fees, including those made under 28 U.S.C. §2412 (d)(1)(A) and (B) and 5 U.S.C. §504(a)(1) and (2), which do not allow differing procedures to be established by rules of court.

Further, the particular facts of this case wholeheartedly support upholding the explicit Congressional intent. The Internal Revenue

Service levied the homestead money of the indigent Petitioner. The Internal Revenue Service refused all efforts at reasonable discourse, and Petitioner was forced to sue the Internal Revenue Service and the Bankruptcy Trustee. Petitioner's attorney conducted the entire case pro bono, at great personal expense, despite the fact that she left the practice of law in 1989 and went to work for Matthew Bender, the legal publisher, and then moved 3,000 miles across country in 1991 to pursue her MBA at The Wharton School. Petitioner's attorney was without benefit of co-counsel and law office resources. Petitioner's attorney was unaware of 26 U.S.C. §7430 until The United States Court of Appeals for the Ninth Circuit filed its Memorandum and served her with information about 28 U.S.C. §2412.

Additionally, Petitioner was Appellee before The United States Court of Appeals for the Ninth Circuit. By the time Petitioner filed her brief, all time limits had passed for the Internal Revenue Service to appeal and file briefs. Is the Internal Revenue Service going to argue that, if Petitioner had included the omitted statement in her

brief, would its behavior/position have changed or been different in some way?

The United States Court of Appeals for the Ninth Circuit allowed the Internal Revenue Service to file its Opposition To The Debtor's Application For Attorney's Fees And Costs approximately 13 days *after* the 14 days allowed by Ninth Circuit Rule 39-1.7. With the virtually unlimited resources of the Internal Revenue Service, this is much more unforgivable than Petitioner's failure to include in her brief a statement that can't possibly be argued would have changed the position or behavior of the Internal Revenue Service.

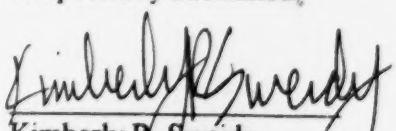
Congressional intent is obvious from the statutes discussed above. Attorney's fees and costs are not a primary cause of action, as is a complaint for determination of tax liability. Attorney's fees and costs in cases such as this are a legitimate method of achieving equity for the party that prevails against the substantially unjustified position of the United States, particularly where the United States is totally nonresponsive and completely lacking in integrity in dealing with the matter. As such, Congress saw fit to give the prevailing

party thirty days after the final judgment to make a request for attorney's fees and costs. This is explicit, consistent, totally understandable, just, and equitable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUGUST 15, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BARBARA JEAN O'NEIL, aka Barbara Jean Kerpsack,
Plaintiff,

v.

RAYMOND CAREY,
Defendant-Appellant,
and
INTERNAL REVENUE SERVICE

No. 92-16038

D.C. No. CV-91-02564-SAW

ORDER

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **GEORGE**,* District Judge.

Appellee's request for attorneys fees is DENIED.

---

* The Honorable Lloyd D. George, Chief United States District Judge for the District of Nevada, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEPTEMBER 23, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BARBARA JEAN O'NEIL, aka Barbara Jean Kerpsack,
Plaintiff,

v.

RAYMOND CAREY,
Defendant-Appellant,
and
INTERNAL REVENUE SERVICE

No. 92-16038

D.C. No. CV-91-02564-SAW

ORDER

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **GEORGE**,* District Judge.

Appellee's Motion for Reconsideration and Clarification of Order Denying Request for Attorney's Fees is DENIED. Denial of attorney's fees was appropriate pursuant to Circuit Rule 39-1.6.

---

* The Honorable Lloyd D. George, Chief United States District Judge for the District of Nevada, sitting by designation.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

BARRY P. O'NEIL
Debtor.

No. 1-88-01958

In re

BARBARA JEAN O'NEIL,
Debtor.

(Consolidated)

ORDER DISALLOWING CLAIM

The Trustee in this Chapter 7 case sold the debtor's residence. The exempt proceeds were turned over to the debtors. Enough funds remained in the estate to pay priority claims, including the priority tax claim of the IRS. However, the IRS did not wait for the estate to close; it seized the debtors' homestead funds after entry of their discharge, as it had a right to do.

Ever since then, debtor Barbara Jean O'Neil has been trying to place herself in the shoes of the Internal Revenue Service so that she, and not her creditors, would receive first monies from the distributions of the Trustee. However, this result is clearly forbidden by section 507(d) of the Bankruptcy Code, which provides that

anyone subrogated to the rights of a tax claimant is not subrogated to the right of the holder of the claim to priority. The court has previously denied her motion to "substitute" herself as a priority tax creditor.

The Trustee has now objected to the claim of the IRS, on grounds that it has been paid. The IRS, of course, does not object. However, Barbara O'Neil has objected. She thinks the Trustee should have to pay the IRS anyway, even though it has been paid in full. This will result in an overpayment to the IRS, which she will then claim. Thus, she hopes to accomplish indirectly what the Code forbids: subrogating herself to a priority tax claim.

O'Neil tortures the Code in order to make her case, but her arguments have no merit. Basically, she argues that a claimant's rights are fixed as of the commencement of the case, so that postpetition satisfaction of the claim from a source other than the estate cannot be considered. She relies on section 558, which gives the Trustee any defense available to the debtor, but she would have the court read the words "only available to the debtor at the time the case was filed" into the statute. Those word [sic] are not there, and

section 558 is intended to give the Trustee minimum rights, not set a limitation on his rights.

There are many instances where a claim which is valid on the petition date later becomes subject to disallowance. The most common example is a negligence claim against the debtor which is satisfied postpetition by the debtor's liability insurance. Under O'Neil's reasoning, the Trustee would have to honor the claim even though the claimant has already been paid in full.

The court will not permit sophistry and tortured logic to circumvent an express provision of the Bankruptcy Code. Accordingly, O'Neil's objections are overruled and the claim of the IRS is disallowed as having been paid in full.

SO ORDERED.

Dated: June 10, 1991

Alan Jaroslovsky
U.S. Bankruptcy Judge

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ORIGINAL FILED
June 10, 1991
PAUL C. KARNEY, JR., Clerk
U.S. BK. CT. SANTA ROSA

Attorney for Defendant, RAYMOND CAREY, Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re:

BARRY P. O'NEIL,
Debtor.

Case No. 1-88-01958

CHAPTER 7

In Re:

BARBARA J. O'NEIL,
Debtor.

(CONSOLIDATED)

BARBARA J. KERPSACK,
Plaintiff,
vs.
INTERNAL REVENUE SERVICE
and RAYMOND CAREY, TRUSTEE,
Defendants.

A.P. No. 91-1025

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On May 31, 1991, hearings were held before the Honorable Alan Jaroslovsky in his courtroom in Santa Rosa on the Motion For Summary of Judgment on Complaint under 11 U.S.C. §§523(a)(1) and 505(a)(1) and 26 U.S.C. §6658(a)(2), filed by the Plaintiff, BARBARA J. KERPSACK, and on the Motion For A Judgment On The Pleadings or Summary Judgment filed by the Defendant, RAYMOND CAREY, TRUSTEE. The Plaintiff appeared through her attorney of record, KIMBERLY R. SWEIDY, ESQ., the Defendant, RAYMOND CAREY, Trustee, appeared through his attorney, RAY H. OLMSTEAD, ESQ., the INTERNAL REVENUE SERVICE having filed an opposition to the Debtor's Motion For Summary Judgment, but having made no appearance at the hearing, the Court having considered all of the pleadings filed in support and in opposition of said Motions, and the Court having taken notice of the pleadings in this adversary proceeding, and of certain pleadings in the base case, herein, as requested in the Motion For Judgment On The Pleadings or Summary Judgment filed by the Defendant, RAYMOND CAREY, Trustee, good cause appearing,

IT IS HEREBY ORDERED that the Plaintiff's Motion For Summary Judgment on Complaint is denied:

IT IS FURTHER ORDERED that the Motion For Judgment On The Pleadings Or Summary Judgment filed by the Defendant, RAYMOND CAREY, Trustee, is granted, and that judgment may enter in favor of the Trustee on all issues raised in the Complaint against the Trustee, including, specifically, judgment finding that the debtors were personally liable for the taxes at issue in the Complaint, being the debtors' 1988 income tax liabilities.

Dated: June 10, 1991

ALAN JAROSLOVSKY
U.S. Bankruptcy Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RELATED CASE ORDER

A notice of related cases has been filed suggesting that the following cases are related within the meaning of Local Rule 205-2 or Local Rule 320-1.

C91-2488 SAW In re Barbara Jean Kerpsack
C91-2564 DLJ Kerpsack v IRS

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases **are** related within the meaning of Local Rule 205-2 or Local Rule 320-1.

Stanley A. Weigel
United State District Judge

ORDER

It appearing to the Assignment Committee that these cases are related within the meaning of Local Rule 205-2 or Local Rule 320-1, IT IS ORDERED that all of such cases are reassigned to The Honorable STANLEY A. WEIGEL. Counsel are instructed that all future filings shall bear the initials SAW immediately after the case number. Counsel shall submit sufficient copies of future filings in

the Clerk's office for each case number. **ALL MATTERS PRESENTLY SCHEDULED FOR HEARING IN THE REASSIGNED CASES(S) ARE VACATED AND SHOULD BE RENOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THE CASE HAS BEEN REASSIGNED.**

DATE: 11/6/91

FOR THE ASSIGNMENT COMMITTEE:
Richard W. Wieking

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL FILED
APRIL 7, 1992
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re: BARBARA JEAN O'NEIL, nka
BARBARA JEAN KERPSACK,
Debtor,

Nos. C-91-2564 DLJ (SAW)
C-91-2488 SAW

Consolidated for joint
administration with
BARRY P. O'NEIL,
Debtor

BARBARA JEAN O'NEIL, NKA
BARBARA JEAN KERPSACK,
Appellant,

vs.

INTERNAL REVENUE SERVICE,
RAYMOND, CAREY, Trustee,
Appellees.

MEMORANDUM AND ORDER

Facts

On April 17, 1989, appellant ("debtor") filed a petition under Chapter Seven of the Bankruptcy code.[1] Subsequently, debtor's real property was sold by appellee ("trustee") and her exempt homestead funds of $45, 000 were put into a trust fund to pay 1988 taxes which the estate may have owed. This money was held in trust in the event that the bankruptcy estate would not have sufficient funds to pay the tax claim. Debtor then filed a priority claim on the state on behalf of the IRS for $29,860 to ensure that the tax claim would be paid by the trustee rather than out of her homestead funds.

After debtor's discharge, but before the assets of the estate were distributed to the creditors, the IRS levied on debtor's homestead trust fund and collected $33,545.40.[2] Subsequently, it was determined that sufficient funds existed in the estate to pay the entire

---

[1] Appellant's bankruptcy petition was consolidated for joint administration with a bankruptcy petition filed by her ex-husband, Barry O'Neil.

[2] Of the $33,545.40 paid to the IRS, Ms. Kerpsack paid $11,660.20 and Mr. O'Neil paid $21,885.20.

1988 tax claim, and the homestead money need not have been put into a trust nor levied upon by the IRS. Debtor, seeking reimbursement from the trustee for her payment of the tax claim, moved to substitute herself in place of the IRS as a priority on the tax claim she had filed against the estate. On February 25, 1991 her motion for substitution was denied by the bankruptcy court on the ground that 11 U.S.C. §507(d) prevents a debtor from being substituted in place of a priority creditor.

Debtor then brought a complaint seeking determinations that (1) the estate still owed the 1988 tax claim, and (2) she was not personally liable for the tax. These determinations would have compelled the estate to pay the 1988 tax claim to the IRS, even though the claim had been paid from debtor's homestead funds; then, after such payment, debtor would presumably have filed for a rebate of the taxes levied out of her homestead fund. In response to the debtor's motion, the trustee objected to the tax claim because it had already been paid.

The bankruptcy court issued two orders. One order sustained the trustee's objection to the IRS claim filed by debtor, thus

disallowing the claim. The other order denied summary judgment for debtor on all of her claims, granted summary judgment in favor of the trustee and the IRS, and specifically found that debtor was personally liable for the 1988 tax claim. Debtor's appeals of the two orders were related by order of this Court.

Discussion

A. Disallowance of IRS Claim.

The bankruptcy court held that the trustee's objection to the IRS claim filed by the debtor was justified, and disallowed the claim. The court's decision rested on the trustee's defense that the IRS claim had been paid and was thus no longer valid. Debtor argues that the trustee should not have been allowed to assert a defense of payment to invalidate the IRS claim since that defense only arose long after the filing of bankruptcy.

Title 11 U.S.C. §502 outlines the procedure for determining whether a claim is allowable. That section states that a claim is deemed allowed unless a party in interest objects. If an objection is made, the court is directed to allow the claim except to the extent that it is "unenforceable...for some reason." 11 U.S.C. §502. That a

claim has already been paid is a valid ground for objection and disallowance. 11 U.S.C. §558. Section 502 does not specify whether the ground for disallowing a claim must have been in existence at the time the petition was filed or whether it may arise at some time in the future.

The bankruptcy court is a court of equity and is governed by both the Bankruptcy Act and equitable principles. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 162, reh'g denied, 329 U.S. 833 (1947). The Court need not address debtor's contention that the trustee's objection to the claim is untimely, because the Court finds the objection to the claim is unavailing on equitable grounds. The debtor was ordered to pay the tax because the estate may not have had sufficient funds to pay it. That payment came out of the debtor's homestead funds. Subsequently it was determined that the estate had sufficient funds and the debtor's homestead funds need not have been levied against. Equitable considerations here compel the conclusion that the debtor has been wrongfully deprived of her homestead funds in the amount of the tax. Allowing the tax claim she filed against the estate on

behalf of the IRS is a logical step towards her reimbursement. Disallowing it would force her to pay, from exempt homestead funds, a tax for which the estate itself is properly liable and for which sufficient funds have always been available. The claim must therefore be allowed.

Were the Court to find otherwise, nothing but good will of the IRS could protect a discharged debtor from being forced to pay tax claims that can and should be paid by the estate. Clearly, if the trustee has the funds ready and available to pay a pre-existing tax claim, those funds, and not the exempt assets of a discharged debtor, should be used. A contrary holding would also reward the trustee for delaying payment to the IRS. This would encourage a trustee to delay distribution to the IRS long enough to enable the IRS to levy on a discharged debtor's exempted assets, thus relieving the trustee from paying the tax. Such a result cannot be sanctioned.

B. Summary Judgment.

Debtor asserts that 11 U.S.C. §505(a) permits the bankruptcy court to determine the respective liabilities of the bankruptcy estate and the debtor for a tax debt. Debtor seeks a determination that the

trustee is liable for the 1988 IRS claim and that she is not liable for it. Section 505(a) does allow the bankruptcy court to determine the amount or legality of a tax against the bankruptcy estate. The court may also determine the respective liabilities of the estate and the debtor regarding unpaid taxes. In re Educators Investment Corp., 59 B.R. 910, 913 (Bkrtcy. D. Nev. 1986). The Supreme Court has approved a calculation of a debtor's personal liability for a non-dischargeable tax debt as the amount that could not be satisfied out of the bankruptcy estate. Bruning v. United States, 376 U.S. 358, 360 (1963).

Here, neither party disputes that at the time of debtor's filing, debtor owed $33,545.40 to the IRS. Sufficient funds existed in the bankruptcy estate to pay the entire claim. As discussed supra, the trustee's contention that the payment of the tax extinguished the claim and any liability against the estate is without merit. Thus, the court finds that the estate has a currently existing tax liability in the amount of $33,545.40. In addition, because the estate has sufficient funds to pay the entire tax obligation, the debtor has no liability.

C. Return of Tax Payment to Debtor.

The district court has jurisdiction over an action for wrongful levy by the IRS. 26 U.S.C. §7426(a)(1). This Court has found that the IRS wrongfully levied $33,545,40 of debtor's homestead funds to pay the 1988 tax. In the interests of judicial economy, and to avoid requiring the debtor to refile a complaint against the IRS for return of her tax payment, the IRS must pay $33,545.40 to debtor and her husband upon the trustee's payment of that amount to the IRS.

Accordingly,

IT IS HEREBY ORDERED that:

(1) The bankruptcy court's disallowance of the IRS claim is REVERSED and the claim is reinstated;

(2) The bankruptcy court's summary judgment order is MODIFIED to find that under 11 U.S.C. §505(a), the bankruptcy estate is liable for the 1988 tax claim in the amount of $33,545.40 and the debtor has no liability for that claim;

(3) The trustee is ordered to pay the IRS $33,545.40 to satisfy the 1988 tax claim;

(4) The IRS is ordered to pay $33,545.40 to debtor and her husband upon payment of that amount by the trustee to the IRS. The payment is to be apportioned between Ms. Kerpsack and Mr. O'Neil according to the amount of that sum that each paid to the IRS.

Date: April 7, 1992.

Stanley A. Weigel
Judge

NOT FOR PUBLICATION

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAY 6, 1994
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

BARBARA JEAN O'NEIL aka Barbara Jean Kerpsack,
Plaintiff-Appellee,
v.
RAYMOND CAREY,
Defendant-Appellant,
and
INTERNAL REVENUE SERVICE

No. 92-16038

D.C. No. CV-91-02564-SAW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Stanley A. Weigel, District Judge, Presiding

Argued and Submitted November 3, 1993
San Francisco, California

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges;
GEORGE,** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Lloyd D. George, Chief United States District Judge for the District of Nevada, sitting by designation.

Raymond Carey, trustee for the bankruptcy estate for Barbara Jean Kerpsack (the "Trustee"), appeals a judgment of the district court ordering the Trustee to allow a claim on behalf of the Internal Revenue Service ("IRS") for $33,545.00 in unpaid prepetition taxes against the bankruptcy estate. The Trustee timely appealed the district court's judgment, and we have jurisdiction under 28 U.S.C. §158(d). We affirm.

I

The Trustee contends that it is entitled to use a defense of payment to disallow the IRS' claim, regardless of the fact that Kerpsack's involuntary payment occurred after she had filed her bankruptcy petition. 18 [sic] U.S.C. §558; Fed. R. Civ. P. 8. While we might be sympathetic to the Trustee's arguments on this issue, the defense of payment no longer is available. In its memorandum and order, the district court concluded, pursuant to 26 U.S.C. §7426(a)(1), that the IRS had wrongfully levied against the proceeds from the sale of Kerpsack's homestead and ordered the IRS to refund $33,545.40 to Kerpsack.

The IRS has not appealed the district court's judgment. Further, the Trustee lacks standing to appeal the portion of the district court's judgment directed against the IRS. Ordinarily, a party may only appeal to protect its own interests, and not those of a coparty, even though the outcome of the appeal may have some effect on the party." In re Cinematronics, Inc., 916 F.2d 1444, 1448 (9th Cir. 1990) (internal quotations omitted). In Cinematronics, the trustee of a corporations's bankruptcy estate and the corporation's principal shareholder were counter-defendants to contract and tort claims brought by another company. The district court determined that the bankruptcy court was competent to conduct a jury trial on these claims, and the trustee and shareholder appealed, alleging that a jury trial before the bankruptcy court violated their rights under the Seventh Amendment. On appeal, the court declined to consider whether the trustee's Seventh Amendment rights had been violated because it had failed to raise this argument with the district court. Id.

The district court's determination that the IRS' levy was wrongful, and its order requiring the IRS to refund the levied funds,

concern only the IRS' rights and interests. The Trustee lacks standing to appeal these portions of the district court's judgment. Since Kerpsack's payment to the IRS thus will be refunded, the Trustee no longer can raise a defense of payment under section 558 of the Bankruptcy Code.

The fact that the district court ordered the IRS to return the wrongfully levied money to Kerpsack only after it first has been paid by the Trustee does not alter this conclusion. The IRS' levy has been determined to be wrongful, and the Trustee has admitted that sufficient funds remain in the estate to pay the IRS' priority claim in full. Since Kerpsack thus is guaranteed a refund, the sequence of payments by the parties does not alter the fundamental fact that Kerpsack has not made a permanent, unconditional payment to the IRS.

II

The Trustee's remaining arguments are undermined by the IRS' refund to Kerpsack. Although he objects to a determination of Kerpsack's and the estate's tax liability under section 505 of the Bankruptcy Code, 18 [sic] U.S.C. §505, the district court did not

enter a formal discharge of Kerpsack from her tax debt, and the Trustee admits that the IRS would have been paid from the bankruptcy estate had its claims not have been satisfied by earlier payment. The IRS' refund also obviates the Trustee's claim that Kerpsack's payment did not subrogate her to the IRS' priority claim.

AFFIRMED.

26 U.S.C. §7430 Awarding of costs and certain fees:

(a) In general.—In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for—

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) Limitations.—

(1) Requirement that administrative remedies be exhausted.—A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service.

(2) Only costs allocable to the United States.—An award under subsection (a) shall be made only for reasonable litigation and administrative costs which are allocable to the United States and not to any other party.

(3) Exclusion of declaratory judgment proceedings.—

(A) In general.—No award for reasonable litigation costs may be made under subsection (a) with respect to any declaratory judgment proceeding.

(B) Exception for section 501(c)(3) determination revocations.—Subparagraph (a) shall not apply to any proceeding which involves the revocation of a determination that the organization is described in section 501(c)(3).

(4) Costs denied where prevailing party protracts proceedings.—No award for reasonable litigation and administrative costs may be made under subsection (a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

(c) Definitions.—For purposes of this section—

(1) Reasonable litigation costs.—The term "reasonable litigation costs" includes—

(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished—

(i) the reasonable expenses of expert witnesses in connection with a court proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation fro expert witnesses paid by the United States,

(ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $75 per hour unless the court determines that an increase in the

cost of living or a special factor, such as limited availability of qualified attorneys for such proceeding, justifies a higher rate.

(2) Reasonable administrative costs.—The term "reasonable administrative costs" means—

(A) any administrative fees or similar charges imposed by the Internal Revenue Service, and

(B) expenses, costs, and fees described in paragraph (1)(B), except that any determination made by the court under clause (ii) or (iii) thereof shall be made by the Internal Revenue Service in cases where the determination under paragraph (4)(b) of the awarding of reasonable administrative costs is made by the Internal Revenue Service.

Such term shall only include costs incurred on or after the earlier of (i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or (ii) the date of the notice of deficiency.

(3) Attorney's fees.—For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(4) Prevailing party.—

(A) In general.—The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)—

(i) which establishes that the position of the United States in the proceeding was not substantially justified,

(ii) which—

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(iii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

(B) Determination as to prevailing party.—Any determination under subparagraph (a) as to whether a party is a prevailing party shall be made by agreement of the parties or—

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level, by the Internal Revenue Service, or

(ii) in the case where such final determination is made by the court, the court.

(5) Administrative proceedings.—The term "administrative proceeding"means any procedure or other action before the Internal Revenue Service.

(6) Court proceedings.—The term "court proceeding" means any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court).

(7) Position of United States.—The term "position of the United States" means—

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies, and

(B) the position taken in an administrative proceeding to which subsection (a) applies as of the earlier of —

(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or

(ii) the date of the notice of deficiency.

(d) Special rules for payment of costs.—

(1) Reasonable administrative costs.—An award for reasonable administrative costs shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(2) Reasonable litigation costs.—An award of reasonable litigation costs shall be payable in the case of the

Tax Court in the same manner as such an award by a district court.

(e) Multiple actions.—For purposes of this section, in the case of—

(1) multiple actions which could have been joined or consolidated, or

(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single court proceeding in the same court,

such actions or cases shall be treated as 1 court proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought to treat such actions or cases as joined or consolidated.

(f) Right of appeal.—

(1) Court proceedings.—An order granting or denying (in whole or in part) an award for reasonable litigation or administrative costs under subsection (a) in a court proceeding, may be incorporated as a part of the decision or judgment in the

court proceeding and shall be subject to appeal in the same manner as the decision or judgment.

(2) Administrative proceedings.—A decision granting or denying (in whole or in part) an award for reasonable administrative costs under subsection (a) by the Internal Revenue Service shall be subject to appeal to the Tax Court under rules similar to the rules under section 7463 (without regard to the amount in dispute).

28 U.S.C. §2412 Costs and fees:

...

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party

shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

...

(d)(2) For the purposes of this subsection—

...

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code 1986 (26 U.S.C. 501(c)(3)) exempt from -

taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

....

5 U.S.C. §504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an wards under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When

the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

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28 U.S.C. §1254. Courts of appeals; certiorari; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

....

Ninth Circuit Rule 39-1.6 Request for Attorneys Fees:

A request for attorney's fees, including a request for attorneys fees and expenses in administrative agency adjudication under 28 U.S.C. §2412(d)(3), shall be filed with the Clerk, with proof of service, within 30 days after the entry of the court's decision, unless a timely petition for rehearing or a suggestion for rehearing in banc has been filed, in which case a request for attorneys fees shall be filed within 14 days after the Court's disposition of such petition or suggestion. The request must be filed separately from any cost bill.

A party who intends to request attorneys fees on appeal shall include in its opening brief a short statement of the authority pursuant to which the request will be made.

Ninth Circuit Rule 39-1.7 Opposition to Request for Attorneys Fees:

Any party from whom attorneys fees are requested may file an objection to the request. The objection shall be filed with the Clerk, with proof of service, within 14 days after service of the request.